No. 305

JAN 8 1900

JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

Filed Jan. 8, 1900

OCTOBER TERM, 1899.

MARY LOUISE KENADAY, Executrix,
Plaintiff in Error and Appellant,

vs.

ARABELLA D. SINNOTT et al.

No. 305.

In Error to and Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT, AGAINST MOTION TO DISMISS OR AFFIRM.

WM. HENRY DENNIS,
Attorney for Plaintiff in Error and Appellant.

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This case results from the keen anxiety of some collateral relations to deprive a widow of part of the provision for her benefit, and to gain something which the testator never intended them to have.

Mr. Justice Hagner, a learned jurist of long experience in the testamentary law both of Maryland and the District of Columbia, who heard the case in the first instance, overruled all the exceptions to the final account of Mrs. Kenaday, the widow and executrix.

The Court of Appeals of the District of Columbia, on appeal by said collateral relations, likewise overruled their exceptions, with a severe censure of the spirit displayed in them, saving one exception, namely, that in regard to the

distribution of an alleged residue of the estate, consisting of United States bonds.

This difference of opinion on one point, between two learned Courts, in itself disposes of the charge that the executrix brings this case for review before the Court of last resort only for the purpose of "delay." As executrix, she is bound to sustain the manifest intention of the testator, so far as she can legally do so. As widow, she is meritoriously entitled to a consideration of her rights from the highest tribunal having jurisdiction.

Sykes v. *Chadwick*, *18 Wall.*, *141.*

The questions involved are of a substantial nature, and of general interest. They may be reduced to these points on behalf of the executrix:

1. That the Orphans' Court has *no jurisdiction* over an alleged residue of personalty in the hands of an executrix undisposed of by the will, that jurisdiction being peculiar to equity, as a matter of trust, in the absence of any statute to the contrary.

2. That the Court of Appeals erred greatly against the canons for the construction of wills, by holding a generic bequest to be specific, and by construing against instead of favorably to a widow who renounced her legal share, and so as to produce partial intestacy in a case at least doubtful.

Hardenberg v. *Ray*, *151 U. S.*, *112.*

I.

THE WRIT OF ERROR AND APPEAL.

As to the method of bringing the case to this Court, in the form both of a writ of error and an appeal, it was prompted, out of an abundance of caution, by the diligence and ingenuity shown by the parties on the other side and their counsel in seeking to escape from a hearing of the case here upon its merits.

The reasoning of the learned counsel, however, appears to proceed in a circle, that is to say, they argue that the appeal is void, because the case came here upon the writ of error, and the writ of error is void because the case ought to be brought here upon appeal!

If it be necessary to answer this mode of argument, it may be said that the writ of error was applied for and granted under the authority of *Campbell* v. *Porter*, 162 U. S., 478-489. That was a case upon the validity of a testamentary paper; but the Maryland Act of 1798, ch. 101, which is the law of the Orphans' Court in the District of Columbia, provides that *all* controversies in that Court shall be subject to a trial by jury upon an issue or issues, whenever either of the parties shall require it.

The Maryland Act of 1798, ch. 101, sub-ch. 15, provides as follows:

"16. Whenever either of the parties having a contest in the Orphans' Court shall require, the said court may direct a plenary proceeding, by bill or petition, to which there shall be an answer on oath (or affirmation) and if the party refuse to answer on oath (or affirmation, as the case may require) to any matter alleged in the bill or petition, and proper for the Court to decide upon, the said party may be attached, fined and committed, or his property may be attached and sequestered as aforesaid.

17. And on such plenary proceeding all the depositions shall be taken in writing, and recorded; and in case either party shall require, the Court shall direct an issue or issues to be made up and sent to any court of law which may be most convenient, under all circumstances, for trying the same. * * * *"

By the recent Act of Congress, approved June 8, 1898, all such issues shall be tried by a jury impaneled *in the Orphans' Court itself.*

It is difficult to see how a statutory court, such as the "Special Term for Orphans' Court business," could be regarded, in any sense, as a court of chancery or equity, from which it is carefully contradistinguished by the statute creating it. The fact that the questions in this case arose upon an account of the executrix does not appear to make this a suit in equity, any more than an action of "account" in a court of common law converts that court into a court of chancery. Nor is the Orphans' Court one of general jurisdiction, sitting at one time as a court of law and at another as court of chancery. But, in order to guard against any defeat of justice upon a mere technicality, and not finding an exactly similar case as authority, the Court of Appeals, D. C., very considerately allowed an appeal as an alternative to the writ of error. This was certainly in aid of substantial justice, and involved no hardship or deprivation of rights to any of the parties, but rather the contrary.

It does not appear ingenuous, in the brief in support of the pending motion (p. 8), to argue that the Court of Appeals considered an appeal to be the proper method in this case, because it came to that Court by appeal. As is very well known, *all* cases, including judgments at law, must be taken to the Court of Appeals, by appeal, under the statute creating that Court.

II.

THE QUESTION OF THE FORMER APPEAL.

As to the arguments in support of the motion, to the effect that this case should have been brought to this Court immediately after the decision on the former appeal therein (14 App. Cas., D. C., 1) it seems sufficient to say that this Court would have dismissed it in the same manner and for the same reasons as the case of *Gilbert* v. *Beneficial Endowment Association*, at October Term, 1898, which was a case remanded by the Court of Appeals, D. C., for the

stating of a further account by the auditing officer of the Court below.

This, by the way, was the first and only appeal by the *executrix*. Two former appeals were taken by the next of kin.

It is submitted that it is obvious from the record that very important discretionary duties were left to the Orphans' Court by the mandate of the Court of Appeals (Record, p. 14.) In directing a distribution of an alleged residue to the "next of kin," the Court of Appeals did not undertake to decide who were the next of kin, or in what proportions they should take, or other essential questions, such as that in reference to the alleged death of one of them (Record, pp. 15 and 16.) The account was entirely recast under the mandate (pp. 7–17).

The authorities cited in support of the motion, to the effect that a second appeal will not lie when the action of the lower court is in accordance with the mandate on the first appeal, apply in cases where the court, whose mandate is thus obeyed, is the court of *last resort* in that case. In this case, the Court of Appeals is an intermediate court; and the Supreme Court of the United States, of course, will only entertain cases where the action of the Court below is final, and leaves only ministerial and not judicial action to be taken by the Court or Courts below.

Lodge v. *Twell*, *135 U. S.*, *232*.
McGurkey v. *Toledo, etc., Ry. Co.*, *146 U. S.*, *536*.

While it is true that the original decision of the Orphans' Court, if affirmed in all respects, would have been final as to the next of kin, it does not follow that its reversal was a "final" decision. A judgment at law in favor of the defendant is final against the plaintiff; but if it is reversed in the Court above that is not a "final" and appealable decision. It only gives the plaintiff the right to a new trial,

after which there may be a further appeal, according to circumstances.

Complaint is made (p. 5) that the opinion of the Court of Appeals on the former appeal is not included in the transcript of record in this case. The answer is that it was part of *another case* in the Court of Appeals, and therefore could not be included or certified in this case. Even if this were not so, the defendants in error or appellees had their remedy by certiorari, to require it to be sent up. The executrix always intended to print it as an appendix to the brief in her behalf, for the convenience of this Court, and it is now printed as an appendix to this brief.

It is respectfully submitted that, so far from its being shown that this case should be summarily dismissed or affirmed, it appears that it is deserving of full argument and consideration when it is reached in its regular order.

WM. HENRY DENNIS,

Attorney for Plaintiff in Error and Appellant.

Court of Appeals of the District of Columbia.

ARABELLA D. SINNOTT ET AL., APPELLANTS,

v.

MARY LOUISE KENADAY, EXECUTRIX.

WILLS; UNDISPOSED OF RESIDUE; DISTRIBUTION; ORPHANS' COURT; EXECUTOR'S COMMISSIONS; ALLOWANCES FOR BURIAL EXPENSES.

1. Where a testator bequeaths to his wife, who is named as executrix, a particular class of claims, and also his business as a claim agent, and as publisher of a periodical, with all books, papers, files, etc.; also 200 shares of certain stocks, also notes and other evidences of indebtedness "of more or less value," and deposits of currency entered on his bank book at a certain bank, the bequests are specific, and will not include U. S. registered bonds acquired after the date of the will, or lapsed legacies, or other personal estate of which the testator died possessed.
2. In such case, where the will has no residuary clause, the undisposed of residue devolves upon the executrix, who however takes no beneficial interest therein, but the same is distributable to the next of kin of the testator.
3. Under the Act of Maryland of 1798, Ch. 101, the Supreme Court of the District, holding a special term for Orphans' Court business, has power and jurisdiction to make and enforce distribution of such undisposed of residue of the personal estate of the testator.
4. That the will makes a specific bequest of certain bonds to "my wife and executrix," will not deprive her of commissions where there is nothing to indicate that it was given by way of compensation as executrix and in lieu of commission.
5. An allowance by the Orphans' Court of commissions to an executrix, within the limits prescribed by the Act of Maryland of 1798, is conclusive, and not subject to review in an appellate court.
6. An allowance to an executrix of credit in her account for expenses incurred in the purchase of a lot in a cemetery and the erection of a monument thereon, is proper, when there has been no extravagance n such expenditure, and the rights of creditors and even of legatees are not prejudiced.
7. Legatees who have assented to a sale by the executrix of certain bonds bequeathed to them and who have received the proceeds of sale and receipted therefor, can not thereafter object to the sale.

No. 855. Decided January 3, 1899.

APPEAL from order of Supreme Court of the District of Columbia holding a special term for Orphans' Court business (Probate No 7744), approving and passing a final account settled by an executrix. *Reversed.*

Mr. F. P. B. Sands and *Mr. W. A. Milliken* for the appellants.

Mr. Wm. H. Dennis for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This appeal is taken by the sister, and the children of a deceased sister, as the next of kin of the late Alexander M. Kenaday, deceased, from an order of the court below, approving and passing what would appear to be a final account settled by the executrix of the deceased. And the questions presented on the appeal, as stated in the assignment of errors, have relation to the construction of the last will and testament of the deceased; the power and jurisdiction of the special term of the Supreme Court of this District, sitting to transact Orphans' Court business, to make and enforce distribution of the residue or surplus of the personal estate of the deceased, not specifically or expressly disposed of by his will; and also as to the right of the executrix to be allowed certain sums claimed as credits in her account, against the exceptions of the appellants

The deceased, Alexander M. Kenaday, died in this city of Washington, on March 25, 1897, leaving a last will and testament bearing date the 3d of April, 1894, and by which his widow, Mary Louise Kenaday, was made sole executrix, and which will was duly proved and admitted to probate, and letters testamentary were granted to the executrix named. The deceased left no child or descendant; but he left one sister surviving, and several children of a deceased sister, who predeceased the testator. The surviving sister and some of the children of the deceased sister are the appellants in this appeal, and the widow, the sole executrix, is the appellee.

The case has been in this court on a former appeal (Sinnott vs. Kenaday, 12 App. D. C. 115: 26 Wash. Law Rep. 121); but the specific questions now presented were not then decided by this court. We did, however, say, that the court below would have the power and jurisdiction to grant relief of the nature then prayed, upon a petition filed at the proper time. The petition in that case had been prematurely filed. There had been, at that time, no final or other account, in the nature of a full account, stated by the executrix and approved by the court, showing the true condition of the estate. The final, or what is substantially a full account, has now been stated, and distribution thereon made. The appellants excepted to the account and distribution, but the exceptions were overruled, and the account and distribution were ap-

proved and passed by order of the court of Oct. 11, 1898. It is from that order that this appeal is taken.

By the will of the testator, all his real estate, of considerable quantity and value was devised to his wife, and also a considerable portion of his personal estate. He specifies by general designation a particular class of claims bequeathed to his wife; and he then bequeaths to her his business as a claim agent, and as publisher of "The Vedette," together with all books, papers, files, furniture, etc., etc., also 200 shares of the Sutro Tunnel stock and Comstock bonds; also notes and evidences of indebtedness to him, "of more or less value;" also deposits of currency entered on his bank book of the National Metropolitan Bank amounting to $10,000, more or less.

He then gives to his sister, Mrs. Sinnott, of New Orleans (the sister who survives him), $12,000 in registered U. S. 4 per cent bonds, on special deposit in the National Metropolitan Bank.

Then follow gifts to the children of Mrs. Piles, his deceased sister, "out of the *residue* of 4 per cent. bonds deposited as aforesaid $3,500 as follows:"—naming the legatees, and the amounts given to each, though the several amounts added only make $3,000, and not $3,500—thus leaving of the residue of $3,500 U. S. Bonds on deposit in bank, $500 undisposed of. It is alleged by the appellants that of these amounts thus given to the children of Mrs. Piles, the legacy of $500 given to Eloise Piles, and the legacy of $250 given to Henry C. Piles, have both lapsed by the death of the legatees in the lifetime of the testator.

By another clause of the will there is a promissory note for $1,100.00, secured by a chattel mortgage, made by Mrs. Hemenway, which he directed to be canceled, and that his executrix might allow Mrs. Hemenway $500 in settlement of her account. And then in what appears to be a separate clause of the will he declares that "the bond of the city of Richmond for $5,000 bearing 5 per cent. interest, payable January and July (on special deposit with the 4 per cent. bonds of the United States in the National Metropolitan Bank) is hereby devised and bequeathed to my wife and executrix."

There are some other special provisions in the will, but nothing in addition to what we have recited that is at all material to the questions raised on this appeal. *There is no residuary clause in the will.*

It appears by a certificate from the United States Treasury Department, that about a year after the date of the will, that is, on the 1st of April, 1895, the testator acquired and left

standing in his name and to his credit, in the Treasury of the United States, additional $9,000 United States registered 4 per cent. bonds, and thus making the sum total of United States bonds held to his credit at the time of his death amount to $24,500. And in the absence of a residuary clause or bequest in the will, the principal question here is, to whom should these after-acquired bonds, and the $500 of the residue of the $15,500 bonds on special deposit in the bank, and the two lapsed legacies, or such residue thereof after payment of debts, and all other legitimate claims and charges to which they are subject, be distributed?

The will is certainly very unskillfully drawn, but we think there is no great difficulty, by the application of the ordinary principles of construction, in getting at the intention of the testator, and the legal effect of the instrument.

In this final, or what appears to be the full account stated by the the executrix, she charged herself with the amount of the inventory, and with the increased value or increment of the bonds belonging to the estate, the total amount of the inventory being the sum of $36,454 85. Upon this amount she asked and was allowed a commission of ten per cent., making the sum of $3,645.48. This allowance of commission is excepted to by the appellants as being improper, or as excessive, under the facts of the case.

The executrix claimed and was allowed credit for $268.50 paid to the undertaker as funeral expenses; and she also claimed and was allowed as credits in her account the sum of $317 paid for a burial lot in Rock Creek Cemetery, and the sum of $575 paid for a monument placed over the grave of the deceased. These two latter sums are excepted to by the appellants as not being legally chargeable to the estate.

In making the distribution of the surplus or residue of the personal estate, after deductions of all claims and allowances and for debts paid, and for all legacies paid over or retained, the executrix took credit in her account, and in discharge of the inventory, for the household furniture, and the City of Richmond bond for $5,000; and she then makes distribution to herself of the balance, or remaining surplus of the estate, in this form: "on account of the bequest to her by the testator of 'notes and evidences of indebtedness to me;' 'deposits of currency entered on my bank book,' and other personal estate, the residue consisting mainly of United States bonds and deposits in bank, $9,218.76." This distribution is excepted to by the appellants, as being without right or warrant in law.

There is also an objection made by the appellants to a sale

made by the executrix of $1,500 of the United States bonds, the proceeds of which sale, it appears, were paid over to the Piles legatees, and for which they gave their receipts to the executrix.

1. We shall first examine the question as to what right and nature of interest was taken by the widow and executrix of the testator, under the will; as upon the determination of that question the other questions raised by the exceptions to the account may, to a certain extent, depend.

There can be no question but that the bequest of the particular claims mentioned and described by the testator as then depending in the courts, were specific legacies, and would have been adeemed if they had been collected in the lifetime of the testator. And so the bequests in the succeeding clause of the will whereby the testator gave to his wife "200 shares of Sutro stock and Comstock bonds; also notes and evidences of indebtedness to me, of more or less value; also deposits of currency entered in my bank book of the National Metropolitan Bank, amounting to $10,000, more or less," are of the same character as the claims bequeathed. It is very clear that this bequest did not embrace United States registered bonds. In all these bequests specific things or matters are referred to as the objects of the bequests; and if they had been disposed of or extinguished by the testator in his lifetime, the legacies would have ceased to exist as such. It has been held in repeated decisions, that a bequest of 100/ consols now standing in my name at the Bank of England (Roper on Leg., ch. 3), or of 100/ consols, *part* of my stock; (Kirby v. Potter, 4 Ves. 750; Hays v. Hays, 1 Keen, 97; Shuttleworth v. Greaves, 4 M. & Cr. 35; are specific bequests. And while a legacy is general when it is so given as not to amount to a bequest of a particular thing yet a legacy is specific when it is a bequest of a specific part of the testator's personal estate, which is and can be distinguished from the rest of his personal estate. Therefore, a bequest of money to be received under a judgment or decree of court, is a specific bequest, and, consequently, not liable to abate with general legacies; and as a result of this principle, if the fund out of which such bequest is payable fails, or should for any cause prove to be insufficient to fulfil the bequest, the legatee must suffer the loss. Chase v. Lockerman, 11 Gill and Johnson, 186. If, therefore, a thing or subject matter be bequeathed in a will by such description as to distinguish it from all other things disposed of by the will, so that it does not remain at the death of the testator as property embraced in any other bequest made by the will, it is a specific legacy,

as distinguished from a general legacy ; and the legatee is entitled to the very thing bequeathed if it be possible for the executor to deliver it to him, with all interest or devidends received ; but if it can not be delivered, he can have no claim for compensation in money in lieu of the specific thing bequeathed by the will. But, as a distinguishing quality of a specific legacy, and one that gives it preference over other legacies, it must be paid or retained by the executor, while general legacies may be applied to the payment of debts of the estate of the deceased. Specific legacies must be paid or retained by the executor in preference to those which are general, and must not be sold or otherwise applied for the payment of debts or other charges against the estate until the general assets of the testator's estate are exhausted. But while it enjoys this quality of preference or exemption, it is liable to be adeemed by the act of the testator in his lifetime ; and this liability to ademption is a fair test of the character of the legacy itself.

According to the principles just stated, all the legacies, including those given to the wife, except the pecuniary legacy of $500, directed to be allowed to Mrs. Hemenway, are specific legacies ; and therefore such legacies do not, of course, embrace the after-acquired United States bonds, or lapsed legacies, or any other personal estate or funds of which the testator died possessed ; but such estate or funds make up the residue of the estate, which is subject to be applied to the payment of debts, legacies and charges all kinds, and expenses of administration, to which the estate is liable, to the exoneration of the specific legacies.

But though there is no residuary clause in the will, and the specific legacies do not embrace or exhaust the entire personal estate, the testator did not die intestate as to this residue or surplus, remaining after payment of debts, and any legacy not otherwise provided for, and all the charges and expenses to which the estate was liable. Such surplus or residue devolved on his executrix. And the next question is, what interest did she take in it, if any, other than that of mere executrix for purposes of administration, and how and where is she to account for and distribute this undisposed-of surplus or residue ?

It is contended on behalf of the widow and executrix, that this surplus or residue, undisposed of by any express provision of the will, is by law vested in her as executrix ; and that the Orphans' Court, or the special term of the Supreme Court exercising the jurisdiction of the Orphans' Court, under the testamentary act of 1798, Ch. 101, has no jurisdiction or

power over the subject of this undisposed-of residue; and if distribution thereof is to be made, it can only be made and enforced by a court of equity, in the exercise of its jurisdiction in respect to implied or constructive tests. But to this contention we cannot for a moment yield our assent.

It is true, according to the English testamentary system, *at law*, it had been the rule from the earliest period, that the whole personal estate devolved on the executor, and if, after payment of the funeral expenses, testamentary charges, debts and legacies, there should be any surplus, it would vest in the executor *beneficially*. In equity, however, while the rule was, *prima facie*, the same as at law, yet, it was held in many cases, that the general rule *at law* should be controlled *in equity*, in all cases where a necessary implication or strong presumption arose that the testator meant to give *only* the office of executor, and not the beneficial interest in the residue. 2 Wms. Executors, 1263, 1264, where the cases are compiled. This rule remained unchanged in England until the year 1830. In all such cases, the executor was considered as a trustee for the next of kin of the testator, the trust to be declared and enforced by a court of equity; the theory being that the English ecclesiastical courts had no jurisdiction over such trusts, or, as said in one of the cases, "but a lame jurisdiction." Pamplin v. Green, 2 Cha. Cas. 95; Matthews v. Newby, 1 Vern. 133, 134. And in stating the origin and growth of the jurisdiction in equity, in ingrafting a trust upon the legal estate devolved upon the executor, Lord Chancellor Hardwicke, in Southcot v. Watson, 3 Atk. 227, 228 (in 1745), said that, "ever since the case of Foster v. Munt, 1 Vern. 473, before Lord Chancellor Jefferies, (in 1687) which underwent various fates, the doctrine established in this court has been that where a man makes a will and an executor, *and gives him a legacy*, he to be considered as a trustee merely for the rest of kin, upon an equity founded on the statute of distribution." This doctrine of a court of equity, in raising a trust in favor of the next of kin, was introduced in order to overcome what was regarded as an unjust and inequitable result of allowing the executor to take the beneficial interest in the residue to the exclusion of the next of kin. In some of the early cases it was held that where the wife of the testator was made executrix, and there was a surplus or residue undisposed of, she would take beneficially, upon consideration alone of being wife. This was so held in the case of Ball v. Smith, 2 Vern. 675; and in the leading case of Farrington v. Knightly, 1 P. Wms. 544, 549, before Lord Chancellor Macclesfield. The chancellor, in stating his first impressions of that case, said: "An

executor, from his name, is but a trustee, he being to execute his testator's will, and therefore called an executor. In the present case, the testator is not to be looked upon as dying intestate, but to have made the executor a trustee of the surplus; and this is the reason why the spiritual courts can not compel a distribution, *because they can not enforce the execution of a trust.* Indeed, in the case of a wife, it has been held that where she is executrix *and has a legacy*, and there is no disposition of the surplus, she shall have it; but I do not hear any precedents cited that go further." This was said by the chancellor in giving his first impressions of the case; but, upon further examination and consideration, he held, and produced several precedents to show, that the wife being the executrix made no difference, and that where she *took a legacy under the will*, she should be decreed to make distribution of the surplus among the next of kin. 1 P. Wms. 550, and the cases cited, and the note to that case by Mr. Cox. And in speaking of the reason of the rule, the chancellor said: "That as to the reason of the case, it was most plain, the making of the person executor ought not amount to a gift of the testator's personal estate; it was no more than making him a trustee, the very word executor importing, *ex vi termini*, that he was only appointed to execute the will, and to have nothing but the management of the personal estate."

The question of the right of executors to appropriate to themselves the undisposed-of surplus or residue of the personal estate of their testators gave rise to much perplexing and expensive litigation, and the state of the law upon the subject became very unsatisfactory, and was frequently the subject of severe animadversion by the equity judges. See cases of Urquhart v. King, 7 Ves. 225, and Pratt v. Sladden, 14 Ves. 193, 197. And to correct what was conceded to be an unjust and unsatisfactory state of the law upon this subject in England, the statute of 11 Geo. 4 and 1 Wm. 4, was passed. By that statute it was declared that any person appointed an executor shall be deemed by the courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the statute of distributions, in *respect of any residue not expressly disposed of*, unless it shall appear by the will or codicil that the person so appointed executor was intended to take such residue beneficially.

The principle that obtained in the English law prior to the passage of the statute just referred to, never had force or recognition in the jurisprudence of Maryland, and consequently, it never had force or recognition as any part of the law of this District. Indeed, we think we are justified in stating that

such principle never formed part of the American law, and hence Mr. Justice Story was well warranted in laying it down as clear that "in America the surplus is by law universally distributable among the next of kin, in the absence of all contrary expressions of intention by the testator." 2 Sto. Eq. Jur. Sec. 1208.

The executor, as is well understood, derives his title as executor from the will of the testator, but he takes no beneficial interest in the undisposed-of surplus or residue of the personal estate, by mere implication or construction, as by the former English Rule. It is true every executor is, in a certain sense and to a certain extent, a trustee for all persons interested in the preservation and distribution of the personal estate of the testator, and he is equally so in respect to the surplus or residue of the estate undisposed of by the will, as of any other portion of the estate. He takes the estate under the will for purposes of administration, and of distribution to those entitled; and while a court of equity has a long established jurisdiction in all matters of trust, of account, of administration, and of construction, in the settlement of estates, yet such jurisdiction is not exclusive of the very ample jurisdiction conferred on the Orphans' Courts of Maryland, and the special term of the Supreme Court of this District for Orphans' Court business, by the testamentary act of 1798, ch. 101. That act embodies in its various provisions a testamentary and administrative system, intended to be complete in itself. It is by no means limited and restricted in the general scope of jurisdiction conferred on the Orphans' Court, to the limited powers and jurisdiction of the spiritual courts of England, as formerly exercised, in respect to testamentary matters. The title of the act plainly indicates its general scope and policy. The title is "An act for amending and reducing into one system, the laws and regulations concerning last wills and testaments, the duties of executors, administrators and guardians, and the rights of orphans and other representatives of deceased persons." In an act so comprehensive as that of 1798, intended to embrace the whole law of administration of decedent's estates, if it had been the intention of the legislature to exclude the jurisdiction of the Orphans' Court in respect to the surplus or residue of the personal estate of the deceased, undisposed of by his will, and to confide that jurisdiction exclusively to a court of equity, and thus, in such case, to divide the administration between two tribunals, we should certainly find some provision in the statute relating to such an exception from the jurisdiction of the Orphans' Court. But nothing of the kind appears in the act. The

only provision to be found in the act that has reference to the right or interest of the executor in the residuary estate of the deceased, is found in Sec. 6, Sub. Chap. 9. By that section, if the executor be a *residuary legatee*, he may be excused from returning to the court an inventory or account, upon giving bond for the payment of all debts and claims against the estate, and for the payment of all legacies given by the will. But it is very plain that this provision contemplates the case of an express residuary bequest to the executor, and not a right to such residue or surplus undisposed of, arising alone by implication or construction of law.

An inference is sought to be drawn, and as showing that the Orphans' Court was not intended to take cognizance and make distribution of such residue or surplus, from the fact that in the Subch. 11, and the sections of that subchapter, providing for the distribution of an intestate's estate, the word "executor" does not appear. But that fact can furnish no material inference in support of the contention of the appellee. There is no lack of provision in the act conferring power and jurisdiction upon the Orphans' Court to make and enforce distribution of the residue of a testator's estate which has not, by any express terms of his will, been disposed of: the power and jurisdiction of that court being ample to superintend and direct full and complete administration of as well the estates of testators as those of intestates. By Sec. 21 of Subch. 15, the Orphans' Court is instituted "for the purpose of taking the probate of wills, granting letters testamentary and of administration; *directing the conduct and settling the accounts of executors* and administrators, securing the rights of legatees, superintending the the distribution of the estates of intestates, securing the rights of orphans and legatees, and *administering justice in all matters relative to the affairs of deceased persons according to law.*" And further, by Sections 6 and 10 of Subch. 10, relating to the duties of executors and administrators, it is, by the first of these sections, provided, that it shall be the duty of an executor, upon the settlement of his account showing that all debts and claims are paid, to deliver up the estate in his hands to those entitled to receive it; and by the next of these sections, it is made the duty of an administrator, upon the settlement of his account, showing the debts and claims all to be paid, to deliver up and distribute the surplus or residue of the estate as therein directed. And by Section 12, of Subch. 15, among other things, it is provided, that "The Orphans' Court shall have full power, authority, and jurisdiction, to examine, hear and decree upon,

all accounts, claims, and demands, existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may."

These provisions of the statute are certainly ample to confer authority and jurisdiction upon the Orphans' Court, or the special term of the Supreme Court exercising the jurisdiction of the Orphans' Court, to direct and enforce the distribution of the undisposed-of residue of the personal estate of the testator, in this case; and we are clearly of opinion, that the executrix, the widow of the deceased, did not take, by any construction of the will, any beneficial right or estate in such undisposed-of residue, as distinguished from her title merely as executrix; and that such undisposed-of residue must be distributed to the next of kin of the testator.

2. The next question is that raised by the exception to the allowance of the commission to the executrix.

It is objected in the first place, that no allowance of commission should have been made, because the specific bequest of the City of Richmond bond, for $5,000, was bequeathed by way of compensation for all trouble and services to be rendered by the executrix in the administration of the estate; and in the second place, if such specific bequest was not intended as such compensation to the executrix, the rate of commission allowed was excessive and unreasonable.

We are of opinion that neither of these objections can prevail. The bequest of the Richmond bond was to "my wife and executrix," without other designation, but nothing to indicate that it was given by way of compensation, and to be taken in lieu of commissions. The descriptive words used to designate the legatee were entirely natural and proper, and were clearly intended as mere *descriptio personæ* of the legatee; and if the wife had failed to obtain letters testamentary, she would, doubtless, have taken the legacy, notwithstanding her failure to become executrix by qualification. This legacy, therefore, can not be treated as compensation in the place and stead of the commission allowed by law. The terms of the bequest will not bear any such construction.

Nor can the objection that the rate of commission is excessive and unreasonable be available to the appellants on this appeal. The statute, by its terms, declares that the commission to be allowed to the executor or administrator shall be, *at the discretion of the court*, not under five per cent. nor exceeding ten per cent. on the amount of the inventory

or inventories, excluding what is lost or hath perished." Act 1798, Ch. 101, Subch. 10, Sec. 2. This provision of the statute, having fixed a minimum and maximum rate of commission to be allowed to executors and administrators, and vested a discretion in the Orphans' Court, restricted only by those limits, an allowance by that court, or court exercising its powers and jurisdiction, within those limits, is conclusive, and therefore not the subject of review in an appellate court. This has been uniformly held by the Court of Appeals of Maryland, in cases where this question on this statute has arisen. Wilson v. Wilson, 3 G. & J. 20; Gwynn v. Dorsey, 4 G. & J. 453; McPherson v. Israel, 5 G. & J. 60; Thomas v. Frederick Co. School, 9 G. & J. 115. The court below was therefore clearly right in overruling the exception to the commission allowed the executrix.

3. Then, as to exceptions to the allowances for the price paid for cemetery lot in Rock Creek Cemetery, at this city, and the price paid for monument placed over the grave of the deceased. The statute provides for the allowance for funeral expenses of the deceased, at the discretion of the court, not to exceed $300. In this case $268.50, were paid the undertaker as funeral expenses. The allowance made of $317 for lot in cemetery, and $575 for monument placed on the lot, are charged and allowed as distinct claims for expenditure incurred for the interment of the deceased. If this were the case where creditors were prejudiced by the allowance of these expenditures, or even legatees whose legacies were lessened by the allowance, the exceptions might receive different consideration.

But this is not such case. The case here is one where the deceased has left a considerable estate, but no children or descendants; and his estate goes to his surviving wife and certain collateral relations. He occupied in life a respectable position in society, and was entitled at his death to such funeral obsequies and respectable interment as accorded with his position and circumstances in life. He was entitled to be buried in the cemetery, and to have his grave marked and distinguished with such monument as is customary with persons of his position and estate. To inter his body in a cemetery, the usual place of interment, it was necessary that a lot should have been purchased, and improved, and distintinguished by a suitable monument, to make it conform to its environment, at least to a certain degree. The expenses incurred for these purposes were not strictly funeral expenses; certainly not within the sense and meaning of the provision of the statute, which limits funeral expenses to an amount not to

exceed three hundred dollars. It does not appear that there was any extravagance in the expenditure for these objects, and we can not say that there was error in allowing credits for the amounts claimed in respect to them by the executrix. It would seem to be an ungracious act, on the part of the exceptants, deny a[illegible] object to the right of the widow and executrix of the testator, to place over the grave of the latter a lasting memorial structure, at the expense of his own estate, simply because it may lessen to a small extent the amount of distribution that they would otherwise receive. If it were shown that such expenditure was extravagant, and for inappropriate objects, quite another question would be presented; but there is nothing to show any such state of case.

4. And lastly, with respect to the exception to the sale by the executrix of the $1,500 United States bonds, we think there is nothing in the case to support the exception. If the bonds had been of denominations capable of specific delivery, and the legatees had desired such delivery, it would have been the duty of the executrix to have delivered the bonds. But it appears the legatees were content to have the bonds sold and to receive the money therefor, and they did receive the money and receipted to the executrix for it. They can not now be heard to urge an objection to the sale.

It follows from what we have said, that the order of the court below, of the 11th of October, 1898, approving and passing the account of the executrix, must be reversed, and the cause be remanded, that the account be re-stated in accordance with the principles of the foregoing opinion; and it is so ordered.

Order reversed and cause remanded.